

U.S. SUPREME COURT, D.C.
FILED

AUG 13 1940

CHARLES ELMORE COMPLEY
CLERK

No. 220

In the Supreme Court of the United States

OCTOBER TERM, 1940

BENJAMIN H. FULLER AND JOHN J. BERNICE,
PETITIONERS

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRINT FOR THE UNITED STATES IN OPPOSITION

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BENJAMIN H. FULLER AND JOHN J. BERNICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 562-565) is reported in 110 F. (2d) 815.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 27, 1940 (R. 565-566), and a petition for rehearing was denied June 11, 1940 (R. 566). The petition for a writ of certiorari was filed July 8, 1940. The jurisdiction of this Court may be invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioners were improperly convicted of violating the false claims statute (Criminal Code, Sec. 35, as amended June 18, 1934).

2. Whether the offenses charged in the first six counts were properly tried in the Southern Division of the Northern District of California.

3. Whether the admission in evidence of certain affidavits not specifically referred to in the indictment was erroneous; whether, in view of the introduction of these affidavits, a bill of particulars should have been granted; and whether reversible error resulted because of a remark made by the prosecutor when some of the affidavits were introduced.

4. Whether there was sufficient evidence to warrant the submission to the jury of the offenses charged.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 18-22

STATEMENT

An indictment in thirteen counts was returned against the petitioners and four others in the District Court for the Northern District of California, Southern Division (R. 1-43). The first twelve

counts were based upon the false claims statute (Criminal Code, Sec. 35, as amended, Appendix, *infra*, p. 18). The first six counts charged that the defendants unlawfully, knowingly, and willfully falsified, concealed, and covered up by a trick, scheme, and device a material fact in a matter within the jurisdiction of a department and agency of the United States. The next six counts charged that the defendants used and caused to be used certain affidavits knowing the same to contain certain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the United States. These twelve counts alleged, in effect, that under regulations promulgated by the Secretary of the Treasury on January 31, 1934, pursuant to the Gold Reserve Act of 1934,¹ the United States mints were authorized to purchase gold recovered from natural deposits in the United States, and which shall not have entered into monetary or industrial use, subject to the condition that where the gold was delivered by persons who had recovered such gold by mining or panning the delivery should be accompanied by a properly executed affidavit on Form TG-19; that those executing Form TG-19 are required to state therein, *inter alia*, the name and location of the mine or deposit from which the gold was recovered and the period within which the recovery took place; that on certain dates the

¹ See Appendix, *infra*, pp. 20-21.

defendants made six shipments of gold to the United States mint at San Francisco; and that, for the purpose of inducing the mint to purchase this gold, the defendants caused each shipment to be accompanied by an affidavit executed by a particular defendant which falsely stated that the gold was recovered from a certain mine during certain periods. It was also alleged that the affidavits falsely stated that the gold was mined by those who executed the affidavits.

The thirteenth count charged a conspiracy under Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) to defraud the United States by the commission of acts similar to those referred to in the preceding twelve counts. The presentation to the mint of the affidavits which were the subject of those counts was alleged as overt acts.

These affidavits are annexed to the indictment as Exhibits A through F (R. 25-43). The evidence with reference to them may be summarized as follows:

Petitioner Fuller executed the originals of Exhibits A, B, and C.² These affidavits were applications to the mint at San Francisco on Form TG-19 to purchase quantities of gold allegedly recovered by petitioner Fuller. He swore in these affidavits that the gold to which they relate was recovered by him from the Fuller mine, Amador County, California, during the period from Sep-

² These are included in U. S. Exhibit 8, which is on file with the Clerk of this Court.

tember 1, 1937, to October 15, 1937, and that he recovered this gold by mining or panning.

Petitioner Bernich executed the originals of Exhibits D, E, and F.³ These affidavits alleged that the affiant himself recovered the gold described from the Fuller mine by mining or panning during the periods February 1 to February 12, 1936, April 25 to May 8, 1936, and January 7 to February 12, 1938.

Three employees of the San Francisco mint testified that they received the above affidavits; that the gold described therein was purchased by the mint and payment therefor made to the petitioners (R. 224-230).⁴

In support of the Government's position that neither of the petitioners was operating the Fuller mine during the periods specified in the affidavits, it introduced testimony that petitioner Fuller during the time when, according to his affidavits, he was obtaining the gold described therein, was employed as a watchman by the General Petroleum Company. According to the records of that firm, he worked for it in Berkeley, California, five days a week and eight hours a day from January 1937 to the time of the trial (R. 364-366). As to petitioner Bernich, Stephen Sanguinetti testified that Bernich worked with him at a mine known as the

³ These are likewise included in U. S. Exhibit 8.

⁴ See U. S. Exhibit 5, on file with the Clerk of this Court.

Fern mine from 1935 to May 1936 (R. 342-343). Bernich and Sanguinetti then leased another mine known as the Amador Queen in June 1936 and worked it until the owner cancelled the lease in April 1938 (R. 233-234, 339-344). Letters from Bernich to the owner (R. 236-238) indicate that Bernich was operating the mine during such period. Sanguinetti testified that while he and Bernich were operating the Fern and Amador Queen mines, Bernich worked five and a half days a week, about seven hours a day (R. 341-343). From January 1936 to April 1938 Sanguinetti worked constantly with Bernich and during this period he never saw the latter work in the Fuller mine (R. 299, 341-345, 347-348).

There was also testimony that the Fuller mine was not in operation during part of the time when, according to two of Bernich's affidavits, he was recovering gold therefrom. That mine adjoins the Amador Queen mine and is connected to it by a tunnel. Access to the Fuller mine could only be had by going through the Amador Queen mine (R. 263, 298, 302, 345). During January or February 1936, there was a cave-in in the connecting tunnel (R. 256-258, 260, 300-302). Two witnesses testified that from the time of the cave-in to June 1936 nobody was working in the Fuller mine and that Bernich did not work there during that period (R. 260-261, 299-300). Bernich told witness Burke that he did not work in ^amine but purchased gold

from miners (R. 281-282) and on various occasions exhibited to Burke quantities of gold which he said he had bought (R. 285-286).

The petitioners were acquitted under the first count and convicted under the remaining counts (R. 114, 542), and were sentenced to five years' imprisonment on each of counts 2 through 12 and to two years' imprisonment on the conspiracy count, the terms of imprisonment to run concurrently (R. 122-131, 548-549). Upon appeal, their convictions were unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 562-566).

ARGUMENT

I

The petitioners contend that they were improperly convicted under the false claims statute for a number of reasons.

(a) Relying upon the language of Sections 3 and 4 of the Gold Reserve Act, (Appendix, *infra*, pp. 18-19), petitioners apparently contend that there was no legislative basis for the prosecution since those sections relate to the acquiring of gold by private individuals and others rather than its sale to a United States mint. In consequence, they also apparently assert that there was no basis for the regulations of the Secretary of the Treasury governing the purchase by and sale to a mint of gold (Pet. 6-8; Br. 30-32). From this petitioners presumably conclude that the subject matter of the

prosecution did not involve a matter within the jurisdiction of the Treasury Department, as required by the false-claims statute.

Sections 3 and 4 of the Gold Reserve Act undoubtedly do not cover the purchase by or sale to a United States mint of gold. But Section 8 of the Act, amending Section 3700 of the Revised Statutes (Appendix, *infra*, pp. 19-20), provides that "With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; * * *." And Section 11 of the Act (Appendix, *infra*, p. 20) gives authority to the Secretary to issue, with the approval of the President, "such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act." It was pursuant to these sections and not Section 3 of the Act that the Secretary issued the regulations governing the purchase of gold by mints and requiring certain affidavits to accompany the deposit of gold. Sections 35 and 38 of Article VI of the regulations, Appendix, *infra*, pp. 20-21.⁵ Peti-

⁵ Section 2 of Article I of the regulations (Appendix, *infra*, p. 20) defines their scope and specifically states that while Articles 2, 3, 4, and 5 of the regulations refer particularly to Section 3 of the Act, "articles 6 and 7 refer particularly to sections 8 and 9, respectively, thereof."

tioners' attack upon the regulations consequently falls, and the matter was within the jurisdiction of the Treasury Department.

(b) The contention of petitioners that the rules and regulations of the Secretary of the Treasury are unconstitutional (Pet. 10-12; Br. 33-37) is based upon the same misconception of the provisions of the Gold Reserve Act under which those regulations were promulgated. Certain general contentions with reference to the validity of the statute (Pet. 9) are clearly fallacious, but even though the statute were unconstitutional that would not prevent the prosecution of petitioners under the false claims statute. *United States v. Kapp*, 302 U. S. 214, 217-218; *Kay v. United States*, 303 U. S. 1, 6-7; *Hills v. United States*, 97 F. (2d) 710, 713 (C. C. A. 9th).⁶

(c) Petitioners contend that the false claims statute was superseded by the Gold Reserve Act because the latter statute relates specifically to the subject of gold (Pet. 12-14; Br. 38-41). But nothing in the Gold Reserve Act undertakes to penalize false claims. In any event, petitioners make specific reference only to Section 4 and, as we have

⁶ The above points as to the constitutionality of the Gold Reserve Act and the validity of the regulations of the Secretary of the Treasury were, according to the petitioners' application for rehearing in the Circuit Court of Appeals (p. 2), first argued in that court in that petition.

indicated, the instant prosecution is not based on Section 4.

(d) Petitioners contend that there is nothing in Section 38 of the regulations which requires the information upon which their prosecution was based. This regulation (Appendix, *infra*, p. 21) provides, however, that every person recovering gold by mining or panning who seeks to sell such gold to a mint must file an affidavit on Form TG-19. The type of affidavit to be filed by such persons and the information to be included therein, when prescribed by the Secretary of the Treasury,⁷ became a part of the regulations themselves. Certainly this affidavit clearly called for the information upon which the prosecution was based (see R. 25-43), and it cannot be said that the petitioners were not adequately advised in advance of their sale of the gold to the mint as to the information for which they would be held accountable.⁸

⁷ Section 5 of Article I of the regulations (Appendix, *infra*, p. 20) provides that "Every * * * affidavit * * * required to be made hereunder shall be made upon the appropriate form prescribed by the Secretary of the Treasury * * *."

⁸ It is several times stated by the petitioners (Pet. 16; Br. 38) that the United States did not lose by the transactions with them. It is well settled that under that portion of the conspiracy statute dealing with conspiracies to defraud the United States, allegation and proof of a pecuniary loss to the Government is not required. *Hammerschmidt v. United States*, 265 U. S. 182, 187; *Haas v. Henkel*, 216 U. S. 462, 479. A similar holding was made with reference to the false claims statute by the Circuit Court of Appeals

II

Petitioners contend (Pet. 17-18; Br. 43) that the offenses charged in the first six counts were committed and should have been tried within the Northern Division of the Northern District of California,⁹ since the affidavits therein referred to were all signed, sworn to, and executed in Jackson, Amador County, which is within that division. This contention is without merit. It is obvious that the Government was not deceived until the affidavits reached the mint at San Francisco in the Southern Division. It would seem, therefore, that the offenses were solely committed in that division. In any event, as the Circuit Court of Appeals said (R. 564) "the offenses had their culmination in the southern division," and hence could be tried in that division under the statute relating to continu-

for the Second Circuit in the cases of *Goldsmith v. United States*, 108 F. (2d) 917, certiorari denied, 309 U. S., pt. 1, p. IX, rehearing denied, 309 U. S., pt. 3, p. XII; *United States v. Mellon*, 96 F. (2d) 462, certiorari denied, 304 U. S. 586, and *United States v. Presser*, 99 F. (2d) 819, 822, but the District Court for the Eastern District of Texas has ruled to the contrary in *United States v. Gilliland* (unreported) now pending on appeal to this Court (No. 245, present Term). It is not believed, however, that the granting of a writ of certiorari is required in the instant case because of this conflict. So far as the record indicates, the point was not urged or decided in the court below and it appears that petitioners' reference to a lack of pecuniary loss by the Government was intended to be only a passing comment.

⁹ See Section 53 of the Judicial Code, Appendix, *infra*, pp. 21-22.

ing offenses (Judicial Code, Sec. 42, Appendix, *infra*, p. 21).

In any event, the petitioners do not here question the jurisdiction of the District Court for the Southern Division to try the offenses charged in counts 7 through 12, upon each of which the petitioners likewise received a concurrent five-year sentence. Thus, it would be immaterial even if the contention were sound as to the lack of jurisdiction in the District Court over the first six counts. *Brooks v. United States*, 267 U. S. 432, 441; *Claassen v. United States*, 142 U. S. 140, 146.

III

(a) Petitioners complain of the introduction of certain affidavits not specifically referred to in the indictment—some 200 or more by one George Franklin Fuller, Sr., and others by the petitioner Bernich relating to gold recovered from a mine known as the Fern mine (Pet. 20-21; Br. 44).¹⁰

It is apparent from the record that the George Franklin Fuller, Sr., affidavits were introduced in support of the conspiracy charge (R. 244-248, 271-272, 528), which was not confined to any specific affidavits. While it is true that the presentation to the mint of certain described affidavits was alleged as overt acts in the conspiracy count, the Government, of course, was not limited in its proof of the conspiracy to those overt acts. It is also true that George Franklin Fuller, Sr., was not named as one

¹⁰ These affidavits are contained in U. S. Exhibit 8.

of the defendants in the conspiracy count, but there was evidence that Fuller was a cripple, that the affidavits were taken by two of his sons, George John Fuller and Frank Ellwood Fuller, to various notaries public for the purpose of having the father's signature sworn to (R. 242-249, 253, 270-274, 336-339), and that these sons must have known that the affidavits were false (cf. R. 345-346). These two sons were named as defendants in the conspiracy count, and the affidavits were introduced apparently for the purpose of establishing that those defendants aided in the presentation to the mint of affidavits which swore that the gold to which they referred was recovered from a certain mine during a period when, according to the testimony, that mine was not being operated by anyone (R. 260-261, 299-300). These affidavits were, consequently, admissible in support of the charge in the conspiracy count that the defendants agreed to submit false affidavits to the mint and, under well-settled principles, could be considered not only against those who were instrumental in their presentation, but also against any of the other defendants named if found to be linked with them in the conspiracy charged.

For the same reason the Bernich affidavits were admissible under the conspiracy count. They were also admissible under the substantive counts. The affidavits upon which these counts were based stated that the petitioner Bernich had operated

the Fuller mine during three specific periods. The other affidavits introduced in evidence stated, however, that he had operated the Fern mine during two of these periods, and hence contradicted the indictment affidavits. The affidavits in controversy also corroborated testimony that petitioner Bernich had worked at the Fern mine during those two periods (R. 342-344).

(b) The petitioners also contend that prejudicial error resulted from the remark of the prosecutor at the time of the introduction of the first of the 200 George Franklin Fuller, Sr., affidavits that "it would be cumbersome to file an indictment containing 200 such affidavits" (Pet. 22; Br. 44). Clearly they are not in position to complain of this remark. The remark was evoked by the objection of defense counsel that only such affidavits were admissible as were specifically mentioned in the indictment (R. 247). As we have indicated, these affidavits were admissible under the conspiracy count. Since the affidavits in question were introduced in evidence, obviously no prejudice resulted from the mere statement of the prosecutor that there were some 200 of them in existence.

(c) Placing emphasis upon the 200 George Franklin Fuller, Sr., affidavits, the petitioners contend that error was committed in refusing to grant their demand for a bill of particulars (Pet. 19-20; Br. 43). So far as the conspiracy count is concerned, the Government was not, of course, re-

quired to disclose all of its evidence. Moreover, it enumerated as overt acts the presentation to the mint of the six affidavits in which the petitioners were directly interested. The disclosure of the affidavits in question was primarily a matter which, as we have indicated, concerned the defendants George and Frank Fuller, who are not petitioners here. Under the circumstances, the petitioners, we submit, have not made a sufficient showing of abuse of discretion in refusing a bill of particulars. In any event, each of the substantive counts specifically sets forth the affidavit upon which it was based. It is evident, therefore, that even if a bill of particulars should have been granted as to the conspiracy count, reversible error did not result since the concurrent sentences on the substantive counts exceeded that on the conspiracy count.

IV

The petitioners further contend that their motions for an instructed verdict should have been granted because there was no evidence to establish the falsity of the affidavits set forth in the indictment. However, it would seem readily apparent from the summary of the evidence set forth in the Statement (*supra*, pp. 4-7), that there was ample testimony establishing that the petitioners were employed elsewhere during the periods when, according to the affidavits, they were recovering gold from the Fuller mine. Indeed, there was evidence indi-

eating that that mine was not in operation at all during a portion of the pertinent periods. There was, consequently, sufficient evidence to justify the submission to the jury of the question whether the petitioners had sworn falsely in their affidavits that they had themselves recovered the gold in question from the Fuller mine during the periods alleged. The Circuit Court of Appeals in its opinion stated that the evidence was sufficient to warrant the conviction of both petitioners (R. 564). The evidence establishing the guilt of the petitioners was deemed sufficient by the jury and by both courts below, and the petitioners have made no convincing showing to the contrary. There is, therefore, no occasion for this Court to re-examine the evidence. Cf. *Delancy v. United States*, 263 U. S. 586, 589-590.

Petitioners complain of the statement of the Circuit Court of Appeals, in holding that the evidence was sufficient to sustain their conviction, that the petitioners "did not take the stand and no evidence was introduced in their defense" (R. 565), citing in this connection the statute precluding any inference of guilt from the failure of a defendant to testify (Act of March 16, 1878, c. 37, 20 Stat. 30, Appendix, *infra*, p. 22). It is clear, however, from the language of this statute that it applies only to trials in the District Court.

CONCLUSION

The petition presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

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AUGUST 1940.

APPENDIX

The false claims statute (Criminal Code, Sec. 35, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80)), so far as pertinent, provides:

* * * or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

The Gold Reserve Act of January 30, 1934, c. 6, 48 Stat. 337, provides in part:

SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the pur-

poses of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States. [U. S. C., Title 31, Sec. 442.]

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred. [U. S. C., Title 31, Sec. 443.]

SEC. 8. Section 3700 of the Revised Statutes (U. S. C., Title 31, sec. 734) is amended to read as follows:

“SEC. 3700. With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin, or currency of the United States, authorized by law, or with any funds in the Treasury